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IN THE

Supreme Court of the United States

October Term, 1943

No. 723

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,
Respondent.

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,
Respondent.

Petitioners' Reply to Respondent's Statement in Opposition to Motion for Leave to Proceed With Petition for Writs of Certiorari on Typewritten Transcript of Record and Original Exhibits on File.

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Respondent's Statement (a) Is Not Founded on Fact, and (b) if True, Would Be No Answer to Petitioners' Motion to Proceed.

Respondent opposes petitioners' motion to proceed herein without awaiting the printing of the certified transcript

upon the ground that no federal question was raised in the State courts or even mentioned "aside from one or two passing references clearly insufficient to found the jurisdiction of this court." [Statement, p. 2.]

On the contrary, the federal question was raised and reiterated as will be presently pointed out. However, if the fact were otherwise, this would be ground for denying the review here sought but not for denying our motion to have petitioners' application for such review considered without awaiting the printing of the transcript. It surely does not require the printing of 5,000 pages of typewritten matter to demonstrate whether or not a federal question was raised.

The Facts Exhibit the Invocation of the Due Process Clause of the 14th Amendment at the Earliest Possible Moment and Its Reiteration in Both the Appellate Courts.

It is the **effect** *of the decision and judgment of the* Supreme Court of California—and not some matter to be reached by pleading *before* judgment—that first called for the invocation of the due process clause of the 14th Amendment. [Petition for Certiorari, p. 3.] These causes are, in this regard, totally different from those in which a statute is claimed to be unconstitutional under the due process clause, for there the opportunity presents itself to invoke the protection of the 14th Amendment in the pleadings as soon as an adverse right is asserted under the statute; but where it is the **effect** *of the judgment* that gives rise to the claim of constitutional protection, that claim cannot be made *prior* to judgment. A pleader would display naive ignorance who alleged that "if the judgment prayed for by plaintiff be entered, the

same will deprive defendants of their property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States."

Throughout this litigation, respondent's contention has been merely that when petitioners "are confronted with two alternatives, as they were in the period in 1937 here involved—the *beneficial use* of water or its *waste*—they must under the Constitution [of California] *beneficially use* the water rather than *waste* it." [Respondent's Petition for a Rehearing in the District Court of Appeal, p. 42.] For the first time, the decision of the Supreme Court of California injected into the cases the theory of a duty upon petitioners *to dispose of the surplus flow* of Owens River *not* needed by them, by transporting such surplus through their Aqueduct and *wasting* the same by discharging it on the Mojave Desert and into the Santa Clara River—a course that *cannot* be pursued by petitioners without their *acquisition of flowage rights* in respect of both places of discharge. Respondent's theory was much more modest since it comprehended only the *enforced use* of petitioners' *existing* facilities to a *greater extent* than petitioners had found it necessary to use them to render the service they had undertaken.

The claim of constitutional protection against the imposition of the duty thus *first suggested* by the Supreme Court of California was only called for after its decision declaring such duty and entailing the *acquisition* of flowage rights *not* possessed by petitioners. Up to that point, the constitutional guaranties (state and federal) had been invoked as against the imposition upon petitioners of the distinct duty of operating its *existing facilities* to a capacity in excess of their needs in order to withhold water from Owens Lake for respondent's benefit.

The Instances and Terms in Which Petitioners Invoked Constitutional Protection.

We subjoin, in chronological order, excerpts from the several briefs in the State Appellate Courts demonstrative of the sufficiency of petitioners' invocation of the due process clauses of both the State and the Federal Constitutions.

(1) At page 164 of petitioners opening brief, filed in the Supreme Court of California prior to the transfer of these causes to the District Court of Appeal for hearing, occurs the following:

> "The constitutional provision [of California forbidding the 'waste' of water, Art. XIV, Sec. 3] does not *attempt* to impose on the appropriator a *duty*, by *positive* measures *independent of his use*, to conserve water *not needed by him* in the interest of the State or of its individual citizens, inhabitants or property owners; and even if it had attempted so to do, the effort would have failed **as violative of the due process clause of the Constitution of the United States."**

This first invocation of the due process clause of the Federal Constitution was drawn forth by the trial court's findings (a) that petitioners' duty was to prevent the so-called "waste" of water entailed in its natural discharge into saline Owens Lake, the river's natural outlet [Finding 14, Clk. Tr. pp. 544-545], and (b) that if petitioners had employed other means *available* to them—*i. e.*, full capacity operation of their Aqueduct and reservoirs and the spreading of excess water upon petitioners' *own* lands —the result would have been to prevent such "waste" and to enable a beneficial use to be made of such surplus or of

a substantial portion thereof. [Clk. Tr. pp. 552-554.] This finding was in strict accordance with respondent's theory of its cases.

(2) The Attorney General of California filed a brief as *amicus curiae* in the District Court of Appeal in support of respondent. At page 4 of petitioners' reply thereto, which was served upon respondent, occurs the following:

> "If (as is the fact) defendants [petitioners herein] are fully meeting the demands upon them for water, then to require them to put the *surplus* waters to a beneficial use not comprehended within their undertaking to serve, is not 'to equitably *regulate* the flow of waters in [the State's] streams' [p. 8], but to *take* defendants' *property—i. e.*, the *use* of their Aqueduct—**without due process of law,** in violation of the **Fourteenth Amendment of the Constitution of the United States** and of Article I, Section 13, of the Constitution of California."

(3) Respondent, after the decision by the District Court of Appeal reversing the judgment of the trial court, applied for a rehearing in the former court. Petitioners filed an answer thereto wherein at page 37 reference is made to said "Reply to Brief of *Amicus Curiae*", and specifically to the portion thereof invoking the **due process clauses both of the 14th Amendment** and of Article 1, Section 13, of the Constitution of California. (See paragraph (2) *supra.*)

Thus, by the initial brief on appeal, filed in the Supreme Court of California, was invoked, in the plainest terms possible, the protection of the "due process clause of the

Constitution of the United States"; and in two subsequent briefs filed in the District Court of Appeal, the protection of the due process clauses both "of the 14th Amendment of the Constitution of the United States and of Article 1, Section 13 of the Constitution of California," was further claimed.

After reversal of the judgment of the trial court by the District Court of Appeal, respondent was granted a hearing by the Supreme Court of California, which court had before it all of the briefs theretofore filed as well as briefs subsequently filed. In respondent's petition for that hearing, it complained that the District Court of Appeal ignored the findings of the trial court that petitioners "*had a beneficial use* for the water" that flowed into Owens Lake; that "other means and methods of handling such waters * * * were available * * *;" that "*such other means and methods of disposition would enable the beneficial use of such water*, or a substantial portion thereof" [Clk. Tr. p. 554]; and that "the beneficial use of such water [as flowed into Owens Lake] is forever lost." [Clk. Tr. p. 545.] Thereupon respondent proceeded as follows: "The trial court found that appellants [petitioners herein] *had* a beneficial use for the water in their Aqueduct system—*not* that they had to *hunt up new beneficial uses* as the opinion erroneously states" [p. 41].

The Supreme Court of California, however, proceeds upon the theory of another and distinct duty owed by petitioners to respondent—namely, the duty of withholding *surplus* water from Owens Lake, by transporting the same

beyond the watershed and wasting it upon Mojave Desert and into Santa Clara River.

(4) The Attorney General, having again filed an *amicus curiae* brief reiterating his earlier views respecting the scope of the prohibition upon the waste of water in the Constitution of California, petitioners in reply on this head both to respondent and to *amicus curiae* referred to their answer to the brief of *amicus curiae* in the District Court of Appeal wherein the protection of the **due process clause** of both the State Constitution, Article 1, Section 13, and **of the 14th Amendment to the Constitution of the United States** was claimed as above set forth.

(5) After respondent was granted a hearing by the Supreme Court of California, petitioners filed a "Conspectus of the Salient Points Made by the Respective Parties." Therein at page 67 is noted respondent's contention that, by permitting the surplus water of Owens River to flow into Owens Lake, petitioners had "violated the [California] constitutional provision of Article XIV, Section 3, prohibiting the 'waste of water' ", and also petitioner's refutation thereof, as follows:

> "If the constitutional provision were construed as requiring defendants [petitioners herein] to *prevent a waste* of *surplus* water *entailed by natural conditions* irrespective of their having any use therefor, it would be *void* as a *taking* of their property,—*i. e.*, the use of the Aqueduct,—**without due process of law."**

(6) Respondent filed a reply to said Conspectus, and thereupon petitioners filed a Rejoinder, at page 39 of which they refer to their reply to said brief of *amicus curiae*

on the scope of the constitutional prohibition upon the waste of water. (See paragraphs (2), (3) and (4), *supra.*)

(7) After the decision of the Supreme Court, reversing the action of the District Court of Appeal and affirming the judgment of the trial court, petitioners applied for a rehearing, and at page 16 of their petition therefor occurs the following:

> "(c) DEFENDANTS' SUPPOSED OPPORTUNITIES FOR DISPOSING OF SURPLUS WATER.
>
> (1) *No large scale disposal* of surplus water can be made *unless* defendants do two or more of the following things:
>
> (i) *Construct* otherwise **unneeded reservoirs;**
>
> (ii) Use their lands for the *spreading of water* in **excess of their needs** for underground storage.
>
> (iii) *Purchase* land or *flowage rights* in lands for the **dissipation** of water by evaporation and percolation.
>
> (iv) *Acquire flowage rights* in the channel of Santa Clara River from riparian owners thereon.
>
> (v) Devote **unneeded** and **hitherto unused** *aqueduct capacity* for the transportation of water to any of such points of disposal as may be acquired below Haiwee Reservoir.
>
> "(aa) To require defendants so to do *for the benefit of plaintiff,* would be a **confiscation** of defendants' property in violation of the **constitutional guaranties** against the taking of property *without compensation* or **without due process of law."***

*This subparagraph (aa) is alone referred to by respondent as representative of petitioners' mode of raising the federal question. [Statement, p. 2, footnote 2.]

Whatever might be the shortcomings of this last claim to the constitutional protection if that claim stood by itself, it is not subject to any criticism on the ground of insufficiency when regard is had to the fact that the same claim was made with specific reference to the due process clause of the 14th Amendment of the Constitution of the United States on five, if not six separate occasions in the briefs previously filed. It is quite within established and recognized practice to cite a statute or a case *once* with *particularity* and thereafter refer to it throughout the litigation by any brief locution that will identify it with such initial citation. Thus, having referred to the due process clause of Article XIV of the Amendments to the Constitution of the United States, it may therafter be referred to as the "due process clause" without more. Moreover, although it has been held that a reference to the "due process clause of the Constitution," without more, is insufficient to raise a federal question in a case where, in addition to that clause in the 14th Amendment, there is a like clause in the Constitution of the State in which the action arose, in the causes at bar, the repeated references in the earlier briefs to the "due process clauses" both of the Constitution of the United States and of the Constitution of California, render it impossible to construe the reference in the *plural* to the "constitutional guaranties against the taking of property without due process of law," appearing in petitioners' application for a rehearing in the State court, otherwise

than as inclusive of the respective guaranties of that character in each of said Constitutions.

In Section 82 of "Jurisdiction of the Supreme Court of the United States" by Reynolds Robertson and Francis R. Kirkham (the latter being one of counsel for respondent herein), the rule is thus stated:

> "The contention that the federal question was raised in language of too general a character *will fail* if, from inspection of the whole record, it appears that a certain provision of the federal Constitution, treaties or laws was relied upon to sustain a specific right, or a certain state statute was attacked as denying definite rights. No particular form of words or phrases is essential. It is necessary only that the federal claim and the ground therefor be brought to the attention of the state court with *'fair precision'*; 'and if the record as a whole shows *either expressly or by clear intendment* that this was done, the claim is to be regarded as having been adequately presented.' The rule has been said to be that 'although * * * the particular act of Congress, or part of the Constitution supposed to be infringed by the State law, ought to be *pointed out*, it has *never* been held that this should be done *in express words*. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on * * *'."

Numerous cases are cited in support of this text.

Conclusion.

We have demonstrated (as we think),

(1) That respondent's contention that no federal question is raised, even if sound, would not call for a denial of the motion to consider the petition for certiorari on the typewritten record before the same be printed.

(2) That respondent's statement that no federal question was raised by petitioners in the State courts is utterly erroneous and, we fear, not inadvertently so.

It is respectfully submitted that said motion to proceed herein should be granted as being in the interest of expedition and over-all economy. Counsel for petitioners, after a full review of both the Clerk's Transcript and the Reporter's Transcript, submitted to respondent a list of the passages, selected with liberality yet embracing not more than 15% thereof, as all that need be printed for all purposes. Respondent's insistence upon the printing of the entire record exhibits an utter disregard of the course prescribed by this court in its rules looking to the curtailment of such records.*

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*For example, no question is or can be made respecting the damage to defendants' physical properties; the ability of petitioners to spread additional water in Owens Valley; the availability of brines in Owens Lake suitable for processing in respondent's Mono Plant; the plant apparatus and the physical and chemical details of such processing; respondent's investment and properties; or the detrimental lowering of the alkalinity of the brines by the incursion of water into the lake, *etc., etc.* The testimony on these issues fills by far the larger part of the nine volumes of the Reporter's Transcript. It seems to us that every question raised by the petition for certiorari could be determined by reference to comparatively few of the exhibits on file as part of the record, and that, if such petition be granted, the only other portion of the record that need be referred to is that bearing on the allowance of damages for prospective profits,—a non-jurisdictional question to which the court's attention will be then invited.

Dated at Los Angeles, California, this 13th day of March, 1944.

Respectfully submitted,

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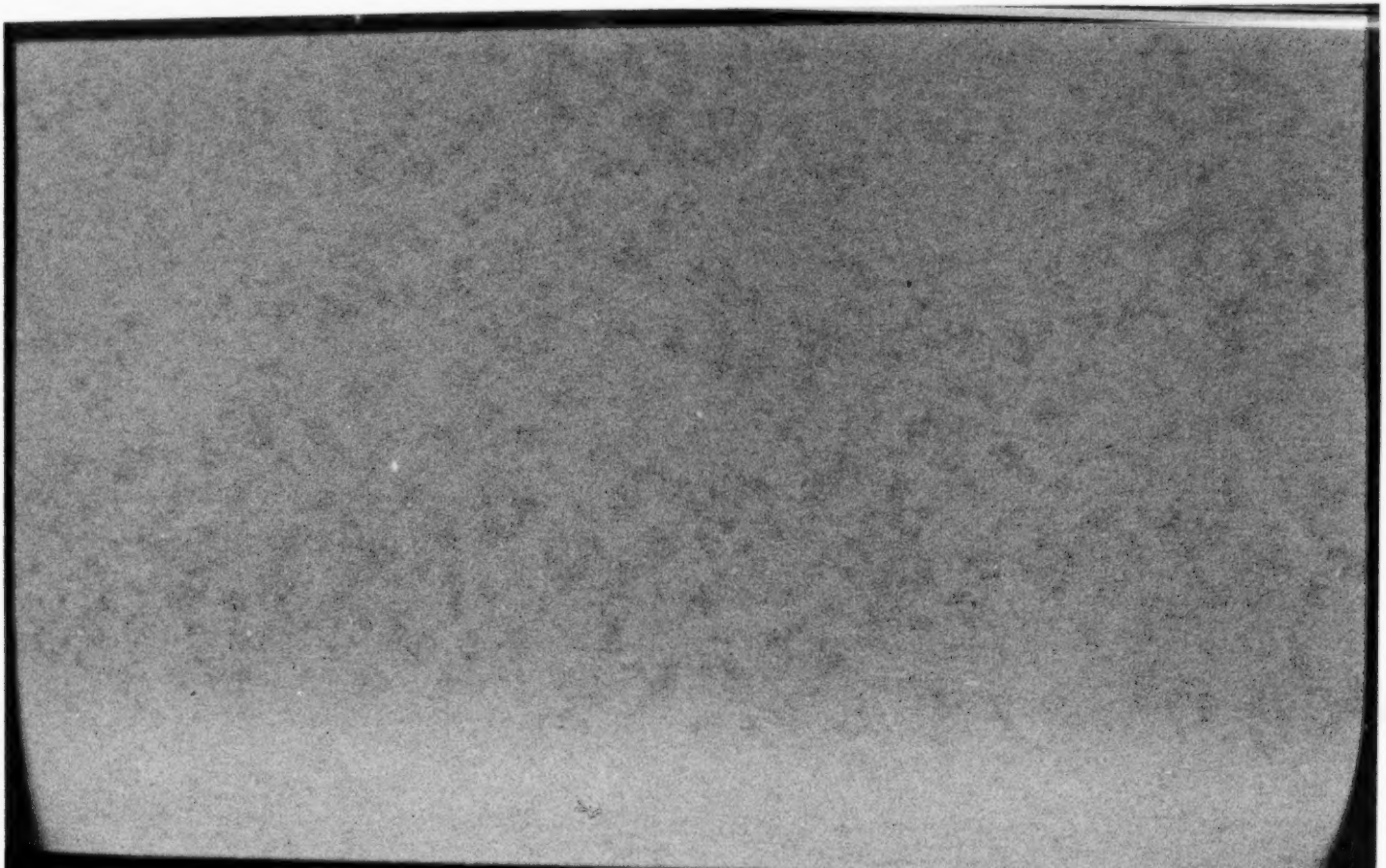

Service accepted this.....day of March, A. D. 1944.

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Counsel for Respondent.

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